83-1663

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ALEXANDER L. STEVAS
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1984

Alan H. Schafer,

Petitioner,

v.

The United States of America

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 35(b) establishes only a deadline for filing a motion or additionally establishes a requirement that the court dispose of the motion within 120 days?

2. Whether or not a district court judge delays unreasonably and thereby loses jurisdiction to consider a motion for reduction of sentence under Federal Rule of Criminal Procedure 35(b) when he delays his decision pending an administrative appeal to the United States Parole Commission?

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OPINIONS BELOW

The opinion of the Court of Appeals which reversed the district court's reduction of petitioner's sentence is to be published and appears in Appendix A hereto. The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 26, 1984. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on March 5, 1984, and this petition for certiorari was filed within 60 days of that date. This Court's

jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 35(b), Federal Rules of Criminal Procedure provides:

> Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT OF THE CASE

Petitioner pled guilty on October 12, 1981, to one count of conspiracy to commit

mail fraud (18 U.S.C. § 371) and two counts of mail fraud (18 U.S.C. § 1341). He was sentenced on November 24, 1981, to pay a $12,000 fine and to serve a term of forty-two months imprisonment. The other 14 counts of the indictment, including an obstruction of justice charge, were dismissed. Petitioner paid the fines on December 8, 1981 and commenced service of his sentence on December 14, 1981.

On February 19, 1982, the United States Parole Commission issued its Notice of Action establishing petitioner's presumptive parole date. The Notice of Action stated that although under the commission's guidelines a defendant convicted of the same offenses and having the same salient factor score would be eligible for parole in ten to fourteen months, his presumptive parole date was

set for eighteen months because of the severity of his offense which included obstruction of justice.

Petitioner filed a Rule 35(b) Motion for Reduction of Sentence on March 19, 1982, within 120 days after imposition of sentence. That motion was based upon the parole commission's action, the effect of incarceration on his mental health and physical health, and his age. The district court held a hearing on the motion for reduction on May 24, 1982, at which time the district court stated that it would delay ruling on the motion until petitioner's administrative appeal was finally determined by the parole commission. The United States registered no objection to the court's delay for this reason. On October 22, 1982, the district court issued its order reducing

petitioner's sentence to time served on December 14, 1982.

The United States argued on appeal that the district court's decision to delay ruling on the motion pending a final decision from the parole commission was an unreasonable ground for delay and the district court therefore lost jurisdiction to rule on the motion. The Fourth Circuit agreed with the United States, reversed, and remanded for reinstatement of petitioner's original sentence.

Petitioner filed a timely Petition for Rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure and a suggestion for a rehearing en banc pursuant to Rule 35 of those rules. The petition urged the court to reconsider its decision on the ground that it was contrary to a prior decision of that

court. The petition was denied, without elaboration, on March 5, 1984..

REASONS FOR GRANTING THE PETITION

The decision of the Fourth Circuit in this case is directly contrary to a decision of the Eighth Circuit Court of Appeals in United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982), on precisely the same issue. Further, whether Rule 35(b) establishes a deadline for filing a motion for reduction, a deadline for the district court to rule on such a motion, or neither one, is an important question of federal law upon which the courts of appeal disagree and which should be settled by this Court.

Rule 35(b) provides that the court may reduce a sentence within 120 after its imposition. This Court stated in dictum

in United States v. Addonizio, 442 U.S. 178, 189 (1979), citing Federal Rule of Criminal Procedure 45, that the time period is jurisdictional and may not be extended. Nevertheless, the courts of appeal for the Third, Fourth, Fifth, Eighth, and Ninth Circuits have concluded that the district courts retain jurisdiction of a motion filed within 120 days for a "reasonable time" after the 120 days expires.[1]

1. This case involves a conflict among the circuits about what constitutes

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[1] E.g., United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982); United States v. Mendoza, 581 F.2d 89 (5th Cir. 1978) (en banc); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975); United States v. United States District Court, 509 F.2d 1352 (9th Cir. 1975); United States v. Janiec, 505 F.2d 983 (3d Cir. 1974), cert. denied, 420 U.S. 948 (1975).

a reasonable ground for delay beyond the 120 days. In United States v. DeMier, 671 F.2d 1200, the Eighth Circuit determined that a district court's delay in ruling on a Rule 35(b) motion until the parole commission rendered a final decision on an administrative appeal was not an unreasonable delay that deprived the court of jurisdiction over the motion. The Fourth Circuit, in this case, concluded that it was unreasonable for a district court to delay ruling on a Rule 35(b) motion pending action by the parole commission and therefore the district court lacked jurisdiction when it issued its order reducing petitioner's sentence. The Seventh Circuit has also decided this issue contrary to the Eighth Circuit. United States v. Kajevic, 711 F.2d 769

(7th Cir. 1983). This conflict among the circuits should be resolved by this Court.

2. This Court stated in Addonizio that the 120 days was jurisdictional and could not be extended. Because of the interpretation of this statement and of the rule by the courts of appeal, an important question of federal law exists which should be settled by this court. If the rule establishes a deadline for the court to act,[2] the courts of appeal are clearly permitting district courts to exceed their jurisdiction in ruling on such motions. If the rule establishes

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[2]On the basis of Addonizio, the Seventh Circuit in United States v. Kajevic, 711 F.2d 769 (1983) and the District of Columbia Circuit Court in United States v. Pollack, 655 F.2d 243 (1980), have opined, but avoided holding, that Rule 35(b) limits a district court's power to act to 120 days after sentencing.

only a filing deadline,[3] then petitioner's motion was timely and, contrary to the Fourth Circuit's conclusion, the district court did have jurisdiction to rule on the motion.

The Courts of Appeal have rejected both of these interpretations, and instead concluded that a district court retains jurisdiction for some indefinite period of

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[3]The Eighth Circuit in United States v. Williams, 573 F.2d 527 (1980), and the Ninth Circuit in Leyvas v. United States, 371 F.2d 714 (1967), treated the 120 days as a filing deadline. This interpretation is consistent with the history of Rule 35(b). The 120 days was substituted for the prior requirement that such motions be filed before expiration of the term of court. F. R. Crim. Proc. 35, Advisory Committee Note, 1946. The term of court rule was a limitation on filing, not on the court's power to rule. E.g., United States v. Mayer, 235 U.S. 55, 67 (1914); United States v. Pile, 130 U.S. 280, 283 (1889); Phillips v. Negley, 117 U.S. 665, 673 (1886).

time beyond the 120 days, which expires without notice to a defendant and for reasons beyond his control. If the time limit was a limit on subject matter jurisdiction, such an extension of jurisdiction would not be possible.

Petitioner filed his motion within 120 days and did everything he could to obtain a timely ruling thereon from the district court. The Fourth Circuit's holding that the district court lost jurisdiction over his motion at some point in time unpredictable by petitioner and his attorneys is contrary to logic and inconsistent with the history of Rule 35(b). Further, the decision unfairly penalizes petitioner for the district court's delay in ruling on his motion, a delay in which the government acquiesced.

CONCLUSION

The petition for certiorari should be granted to resolve the conflict between the courts of appeal and to settle the important question about the time limit in Federal Rule of Criminal Procedure 35(b).

Respectfully submitted.

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APPENDIX A

United States v. Schafer, No. 83-6119 (4th Cir. January 26, 1984). [Caption omitted.]

HALL, Circuit Judge:

The United States appeals from a district court order reducing Alan H. Schafer's sentence from imprisonment of three years and six months to one year. We conclude that the district court was without jurisdiction to enter this order. We, therefore, vacate the order and remand the case with instructions to reinstate the original sentence.

I.

In June, 1980, Schafer was charged in a seventeen count indictment for bribing voters and submitting false and fraudulent absentee ballots through the mails during

an election in Dillon County, South Carolina. Schafer pleaded guilty to one count of conspiracy under 18 U.S.C. § 371, and two counts of mail fraud, under 18 U.S.C. § 1341. The remaining counts were dismissed.

On November 24, 1981, the district court fined Schafer $12,000 and sentenced him to three years and six months imprisonment. Schafer began serving his sentence on December 14, 1981. Later, on February 19, 1982, the United States Parole Commission issued a notice that Schafer would be required to serve eighteen months before he would be eligible for parole. Although Schafer's parole date could have been set as early as ten months, the Commission was swayed by his leadership role in the offense.

One hundred fifteen days after sentencing, on March 19, 1982, Schafer moved for reduction of sentence pursuant to Fed. R. Crim. P 35(b). On April 28, after the 120-day limit in which the court may act on such a motion had expired, the court scheduled a hearing for May 14, 1982, and asked counsel to consider whether it was "appropriate for the Court to [reduce a sentence] merely because it may disagree with the Parole Commission's ruling on the presumptive parole date." The Government filed a response to Schafer's motion, arguing that "actions taken by the U.S. Parole Commission, which may not be in accord with the trial judge's expectations at the time of sentencing, do not provide a basis for collateral attack." At the hearing, the court abstained from ruling on Schafer's

motion because of his "pending...appeal... from a presumptive parole date decision." The Parole Commission affirmed its presumptive parole decision of eighteen months on August 3, 1982.

The district court then entered an order reducing Schafer's sentence to one year. As a consequence of the court's order, Schafer was relieved from serving the six months remaining until his parole date. The court found that its delay in ruling on Schafer's motion was "reasonable" because a sentence reduction was needed to correct an "obvious unjust practice of the Parole Commission."[1] This appeal by the Government followed.

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[1]Schafer suggests that the Parole Commission's brief reference to a dismissed obstruction of justice charge

(Footnote Continued)

II.

On appeal, the Government contends that the district court lost jurisdiction over the motion at issue when it delayed consideration of the motion until after the 120-day deadline in order to review the Parole Commission's decision. Additionally, the Government argues that the appropriate remedy in this case is to order reinstatement of the district court's original sentence. We agree with both of the Government's contentions.

Rule 35(b) states, in pertinent part, that "[t]he court may reduce a sentence

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(Footnote Continued)
was the reason the Commission extended his parole date. The Commission only mentioned this charge, however, in the context of stressing Schafer's leadership role in the offense. Thus, the charge is not relevant to our consideration of the case.

within 120 days after the sentence is imposed,..." On its face the rule limits the time within which the trial court has power to act, however, this circuit and other circuits that have considered the issue have not applied the rule in a mechanical fashion. United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983); United States v. Krohn, 700 F.2d 1033 (5th Cir. 1983); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975).

In Stollings, the Fourth Circuit recognized that it is sometimes impractical for a judge to act within the 120-day period. In that case, upon missing the Rule 35(b) deadline by three days, the trial judge declined to rule on the defendant's motion because he believed he had lost jurisdiction. On appeal, this Court held that where delay is based upon

reasonable grounds, a district judge may properly retain jurisdiction over a timely filed motion for reduction of sentence.

In Stollings, however, Judge Haynsworth specifically warned that the time limitation of Rule 35(b) has "as its dual purpose the protection of the district court from continuing and successive importunities and to assure that the district court's power to reduce a sentence will not be misused as a substitute for the consideration of parole by the Parole Board." 516 F.2d at 1289. Likewise, in United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), the Fifth Circuit noted that limiting the retention of Rule 35 jurisdiction to a reasonable time "should prevent the possibility, however remote, of a district court usurping the function of the Parole

Board...." Id. at 1291. Most recently, in United States v. Kajevic, 711 F.2d at 767, the Seventh Circuit held that "[w]hen a district judge delays action on a Rule 35(b) motion till long after the expiration of the 120 days, for the purpose or with the likely effect of assuming the function of the parole authorities, his delay is unreasonable." Id. 772. See also United States v. Krohn, 700 F.2d at 1033 (holding district court's ten-month delay in reducing defendant's sentence was reasonable because court did not deliberately or effectively intervene in matters committed to authority or [sic] Parole Commission).

In this case, the trial judge purposely delayed consideration of the motion before him until seven months after the deadline in order to review the Parole

Commission's decision. As the trial judge conceded in the order reducing Schafer's sentence, the ultimate reason for the delay was that he disagreed with the Parole Commission's decision. Under these circumstances, we can only conclude that the delay was unreasonable and the court was without jurisdiction.

Lastly, the Government argues that the appropriate remedy in this case is to order reinstatement of the district court's original sentence. We agree. The trial judge was without jurisdiction to reduce Schafer's sentence. We, therefore, hold that reinstatement of the original sentence is an appropriate remedy.

III.

For the foregoing reasons, the judgment of the district court is vacated, and this case is remanded for

reinstatement of the district court's original sentence.

REVERSED AND REMANDED
WITH INSTRUCTIONS

APPENDIX B

United States v. Schafer, No. 83-6119 (4th Cir. March 5, 1984). [Caption omitted]

Upon consideration of appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Widener, Judge Hall, and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
Clerk

Supreme Court, U.S.
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CLERK

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OCTOBER TERM, 1983

ALAN H. SCHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court retained jurisdiction to reduce petitioner's sentence seven months after the 120-day period specified under Fed. R. Crim. P. 35(b) for the granting of such relief had expired.

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ALAN H. SCHAFER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 726 F.2d 155. The order of the district court reducing sentence is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1984. A petition for rehearing was denied on March 5, 1984 (Pet. App. B). The petition for a writ of certiorari was filed on April 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the central figure in a vote fraud scheme, pleaded guilty in the United States District Court for the District of South Carolina to two counts of mail fraud (Counts 3 and 4) and one count of conspiracy (Count 1), in violation of 18 U.S.C. 371 and 1341 (II C.A. App. 5-8).[1] On November 24, 1981, he was sentenced to 42 months' imprisonment, to be followed by five years' probation, and was fined a total of $12,000 (I C.A. App. 22).

On March 19, 1982—115 days after sentence was imposed—petitioner filed a motion to have his sentence reduced pursuant to Fed. R. Crim. P. 35(b) (I C.A. App. 27-28).[2] On October 22, 1982—more than seven months later—the district court reduced petitioner's sentence to one year's imprisonment (I C.A. App. 63-69). On appeal by the government, the court of appeals reversed the district court's sentence reduction order and remanded for reinstatement of the original sentence (Pet. App. 9-10).

1. Petitioner commenced service of his sentence on December 14, 1981 (I C.A. App. 22), and was accorded a parole hearing the following month. See 18 U.S.C. 4205(b)(2). On February 19, 1982, the Parole Commission's Regional Office found that there

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[1] Pursuant to a plea agreement, 14 additional counts charging petitioner with mail fraud (Counts 2, 5-16) and obstruction of justice (Count 17) were dismissed (I C.A. App. 20-22).

[2] In pertinent part, Rule 35(b) provides:

> The court may reduce a sentence within 120 days after the sentence is imposed * * *, or within 120 days after entry of any order of judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

This time limit may not be extended (Fed. R. Crim. P. 45(b)).

was "good cause" (18 U.S.C. 4206(c)) to extend petitioner's presumptive release date beyond that suggested in the parole guidelines; this determination was based in part on the conduct underlying the charges that were dismissed pursuant to the plea agreement (I C.A. App. 39-40).[3]

Petitioner appealed this order to the Parole Commission's National Appeals Board (I C.A. App. 64) and also moved the district court to reduce his sentence (*id.* at 27-28). In his motion, petitioner argued that the Parole Commission's action requiring him to serve 18 months of his sentence was improper since it exceeded the Commission's own guidelines and undermined the court's sentencing intentions (*ibid.*). In particular, petitioner complained that the Parole Commission had improperly taken account of the dismissed obstruction of justice charge in arriving at its presumptive release date (*id.* at 33-36).

On April 28, 1982—five weeks after the expiration of the time period set forth in Rule 35—the district court entered an order scheduling a hearing on petitioner's motion for May 14, 1982 (I C.A. App. 44-

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[3] Since the offenses were of "moderate" severity and since petitioner's salient factor score was the highest possible, the parole guidelines indicated that incarceration for a period of 10-14 months was normally appropriate (I C.A. App. 39). After reviewing "all relevant factors and information presented," however, the Regional Parole Commissioner ordered petitioner "[c]ontinue[d] to a presumptive parole after service of 18 months" (I C.A. App. 39-40) because he was

> considered to be one of the most culpable in the offense behavior and * * * played a leadership role in the offense which consisted of mail fraud, vote buying, and obstruction of justice involving candidates for county offices and the U.S. Congress; and the corruption of the state and federal political system.

47). In addition, the court directed counsel to consider whether it was "appropriate for the Court to [reduce a sentence] merely because it may disagree with the Parole Commission ruling on the presumptive release date" and whether it was "appropriate * * * to enter an order reducing a sentence where an appeal from an administrative ruling (a ruling on a presumptive parole date) is pending and undetermined" (*id.* at 46). In its response, the government stated that petitioner's motion should be denied since "[a]ctions taken by the U.S. Parole Commission, which may not be in accord with a trial judge's expectations at the time of sentencing, do not provide a basis for collateral attack" (*id.* at 59). Petitioner urged that it was permissible for the court to rule immediately on his Rule 35 motion, despite the pending administrative action (I C.A. App. 48-52). After the hearing, the court postponed action on petitioner's motion until the completion of the administrative proceedings (*id.* at 61; II C.A. App. 49-52). The Regional Parole Commissioner's order was affirmed by the National Appeals Board on August 3, 1982 (I C.A. App. 64).

2. On October 22, 1982, seven months after the expiration of Rule 35's 120-day time limit, the district court reduced petitioner's sentence "to the time served * * * as of December 14, 1982," *i.e.*, to one year's imprisonment (I C.A. App. 63-69).[4] Although agreeing "that the Parole Commission may properly consider the character of the offense *for which the defendant was convicted and sentenced* in processing

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[4] Because petitioner's motion had been filed before expiration of the 120-day time limit, the district court held that it retained jurisdiction to act on it (I C.A. App. 65-67; see also *id.* at 98).

a parole application," the court stated that it was improper for the parole authorities "to consider a count of the indictment which was never tried and to which no plea of guilty was ever interposed" (I C.A. App. 65 (emphasis in original)). Since the Commission's reliance on petitioner's conduct underlying the dismissed counts of the indictment constituted the "only significant reason" for setting a presumptive release date beyond the recommended guidelines, the court concluded that it was "appropriate to correct the injustice of the Parole Commission's action" by reducing petitioner's sentence to a time within the parole guidelines (*id.* at 67-68). And, in so doing, the court held that it could grant relief under Rule 35 even though "recognizing its lack of jurisdiction by way of judicial review" to monitor the release decisions of the Parole Commission (*id.* at 68 (footnote omitted)).

3. The court of appeals reversed (Pet. App. 1-10). At the outset it reiterated its holding in *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975), that Rule 35's time limitation is "not * * * mechanical," and that district courts may retain jurisdiction beyond 120 days over a timely filed motion "where delay is based upon reasonable grounds" (Pet. App. 5-7). But because "the trial judge purposely delayed consideration of the motion before him until seven months after the deadline in order to review the Parole Commission's decision," the court of appeals concluded "that the delay was unreasonable and the court was without jurisdiction" (*id.* at 8-9). It therefore vacated the order reducing petitioner's sentence (*id.* at 9-10).

ARGUMENT

In holding that the district court exceeded its jurisdiction in reducing petitioner's sentence, the court of appeals based its decision on the unexceptional view —shared by all of the circuits—that at a minimum the trial court must act on Rule 35(b) motions within a "reasonable" time after the 120-day limitation period has expired. Nonetheless, petitioner contends (Pet. 6-11) that there is general uncertainty as to whether Rule 35 sets merely a filing deadline or a limitation on granting relief and, in addition, that there is a conflict in the circuits as to what constitutes a "reasonable" delay. As we show below, further review of these interrelated contentions is unwarranted in this case.

On its face, Rule 35 strictly limits the time within which a sentence may be reduced to "120 days after [the sentence] is imposed * * *." This time period "is jurisdictional and may not be extended." *United States* v. *Addonizio*, 442 U.S. 178, 189 (1979) (footnotes omitted); see also Fed. R. Crim. P. 45(b).[5] Despite Rule 35's plain language, most courts of appeals, as petitioner points out (Pet. 7, 9-10 & nn. 1 & 3), have allowed the district court to "retain[] jurisdiction for a reasonable time after the expiration of 120 days" in those "rare circumstances in which it is unable to decide the motion within the 120 day period." *United States* v. *Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) (en banc). In effect, these appellate courts have interpreted Rule 35(b) principally as a *filing* deadline, rather than a strict limit on the time during which the court may act on a motion for reduc-

[5] "[T]he court may not extend the time for taking any action under Rule[] * * * 35, except to the extent and under the circumstances stated in [it]."

tion of sentence. *United States* v. *Mendoza*, 581 F.2d 89, 90, adopting in relevant part the panel's opinion 565 F.2d 1285 (5th Cir. 1978); see also, *e.g.*, *United States* v. *Krohn*, 700 F.2d 1033, 1038 (5th Cir. 1983); *United States* v. *DeMier*, 671 F.2d 1200, 1205-1207 (8th Cir. 1982); *United States* v. *Rice*, 671 F.2d 455, 459 n.5 (11th Cir. 1982); *United States* v. *Smith*, 650 F.2d 206, 209 & n.2 (9th Cir. 1981); *United States* v. *Johnson*, 634 F.2d 94, 95 n.1 (3d Cir. 1980); *In re United States*, 588 F.2d 56, 60-61 (4th Cir. 1978), cert. denied, 441 U.S. 909 (1979); *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975); but see *United States* v. *Kajevic*, 711 F.2d 767, 768-771 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (questioning validity of flexibly construing Rule 35's time limits); *United States* v. *Pollack*, 655 F.2d 243, 245 (D.C. Cir. 1980) (dictum).[6]

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[6] The District of Columbia Court of Appeals has interpreted D.C. Super. Ct. R. 35(b)—which is identical to Fed. R. Crim. P. 35(b)—as a "time limit on the power of the court to act" rather than as a filing deadline. *Thompson* v. *United States*, cert. denied, No. 83-5224 (Nov. 7, 1983); *United States* v. *Nunzio*, 430 A.2d 1372, 1374 (D.C. 1981). Florida and Texas also interpret rules limiting the time for reduction of sentence as barring court action after the time has elapsed. *State* v. *Adirim*, 376 So.2d 464 (Fla. Dist. Ct. App. 1979); *State ex rel. Bryan* v. *McDonald*, 642 S.W.2d 492 (Tex. Crim. App. 1982).

Other states, following the majority rule of the federal courts of appeals, interpret rules similar to Rule 35 as containing deadlines for filing motions for reduction of sentence. See, *e.g.*, *State ex rel. Owens* v. *Hodge*, 230 Kan. 804, 641 P.2d 399 (1982); *People* v. *District Court*, 636 P.2d 689, 690 n.3 (Colo. 1981) (en banc) (dictum); *State* v. *Upham*, 439 A.2d 912, 913 n.2 (R.I. 1982) (assuming but not deciding the issue); see also *Klimas* v. *State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977) (holding that trial court has discretion to reduce sentence even when the defendant's motion is untimely).

Whether or not the construction uniformly accorded Rule 35 by the various circuits is consistent with the apparently literal readings of the Rule by this Court in *United States* v. *Addonizio*, *supra*, and *United States* v. *Robinson*, 361 U.S. 220 (1960), this case was correctly decided: by any standard of "reasonableness" the district court exceeded its jurisdiction when it waited more than seven months, until after the Parole Commission had reached its final decision, before ruling on the motion to reduce sentence. Further review by this Court is accordingly not warranted.

Even assuming there is some jurisdictional flexibility under Rule 35, it must be strictly limited to avoid recreating the very problems the Rule is designed to avoid. Rule 35's limitation on the time during which a court may act serves the salutary purposes of promoting finality of result and guaranteeing that "trial courts will not inadvertently usurp the power of the parole board by making delayed rulings on motions to mitigate based on prison conduct." *Sotto* v. *Wainwright*, 601 F.2d 184, 192 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980); see *United States* v. *Inendino*, 655 F.2d 108, 109 (7th Cir. 1981); *United States* v. *Stollings*, 516 F.2d at 1289; 8A Moore, *Moore's Federal Practice* ¶ 35.02[2], at 35-8 (2d ed. 1983).[7] Those courts that have introduced the "reasonable time" exception to the Rule's jurisdictional limits have reached this result "so that defendants would not be penalized for delays that may result from a judge's absence, incapacity or preoccupation

[7] The court's power to reduce a lawful sentence must end at some point, since the authority to relieve a prisoner from punishment once imposed is vested in officials of the executive branch. See *Addonizio*, 442 U.S. at 188-190; *Ex parte United States*, 242 U.S. 27 (1916).

with an overcrowded calendar." *Inendino*, 655 F.2d at 110.[8] No more than a brief period can be considered "reasonable," lest the exception invalidate the rule. See, *e.g.*, *United States* v. *Stollings*, *supra* (4-day delay); *Leyvas* v. *United States*, 371 F.2d 714, 719 (9th Cir. 1967) (8-day delay). Under this standard, the court of appeals was certainly correct in concluding that an eventual delay of seven months for the sole purpose of monitoring the release decision of the Parole Commission patently exceeded the limits of this exception.

Nor does the instant result conflict with the decison in *United States* v. *DeMier*, *supra*. In that case, the sentencing judge erroneously relied on a set of superseded parole guidelines in calculating the appropriate sentence, and the prisoners subsequently filed a timely Rule 35 motion based on the existence of revised guidelines that indicated a longer period of incarceration than the judge had anticipated at the time of sentencing. Immediately thereafter, the judge indefinitely postponed all action on the Rule 35 motion, based on the prosecutor's representation that the Parole Commission might set a release date within the superseded guidelines upon which the judge had relied; when, after more than six months, the Parole Commission failed to do so, the judge reduced the prisoners' sentences to accord with his original sentencing intentions. In affirming the propriety of this reduction of sentence well after the expiration of Rule 35's 120-day period, the court of appeals stated (671 F.2d at 1207):

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[8] This rationale overlooks the fact that these problems are usually attributable to the defendant's own dilatoriness in waiting until just before expiration of the 120-day period to file the motion. See note 9, *infra*.

> The Government by its response to the Rule 35 motion invited the district court to stay its hand in ruling on the timely filed motion until after the Parole Commission had acted. * * * * * We cannot fault the district court for delaying its ruling on the Rule 35 motion pending final action by the Parole Commission where the Government resisted the granting of the motion on grounds that the Parole Commission could consider the [prisoners'] parole requests independently of the new guidelines.

In so holding, however, the court emphasized that its "determination that the district court acted within a reasonable time rest[ed] on the unusual facts presented in this case" (*id.* at 1207 n.16).

Here, in contrast to the "unusual facts" in *DeMier*, the government made clear in its original response that parole release decisions were exclusively committed to the Parole Commission and that, under *United States* v. *Addonizio*, *supra*, the district court's failed sentencing expectations could not provide a basis for undoing a previously imposed sentence (I C.A. App. 59). Despite this unequivocal response, the district court delayed action on petitioner's motion for seven months while awaiting the decision of the Parole Commission Appeals Board. The delay therefore directly usurped the authority, reserved to the Commission, of determining whether there existed good cause for continuing petitioner's period of incarceration beyond the parole guidelines. See *Ex parte United States*, 242 U.S. 27 (1916). Since maintaining the distinction between executive and judicial functions is a major purpose of Rule 35's time limitations, we submit that "[w]hen a district judge delays action on a Rule 35(b) motion till long after the ex-

piration of the 120 days, for the purpose or with the likely effect of assuming the function of the parole authorities, his delay is unreasonable" (*United States* v. *Kajevic*, 711 F.2d at 772). Accord, *United States* v. *Krohn*, 700 F.2d at 1039 ("Our final inquiry is into whether the district court in delaying action on the motion deliberately or effectively intervened in matters committed to the authority of the Parole Commission.").[9]

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[9] An additional consideration supports a finding of unreasonableness here. The trial court's failure to act on the motion before expiration of the 120-day period was caused, in part, by petitioner's decision to wait until 115 days after sentencing before filing the motion. As written, Rule 35 places the responsibility on the prisoner to file his plea for leniency with sufficient promptness so that the court may reasonably act on it before the 120-day period expires. See *Inendino*, 655 F.2d at 110. Indeed, the time limits of Rule 35(b) were extended in 1966 from 60 to 120 days expressly in order to provide a reasonable opportunity for a prisoner to present his plea in time for the court to act. As Fed. R. Crim. P. 35 advisory committee note states (emphasis added):

> The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel *may result in the 60-day period passing before the court is able to consider the case.*

Having delayed until the 115th day before filing his motion, petitioner can hardly complain if the court loses jurisdiction to act not long thereafter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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